BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELENA MENDOZA Claimant	)	
VS.	)	Docket No. 1,059,028
PROMISE REGIONAL MEDICAL CENTER n/k/a HUTCHINSON REGIONAL MEDICAL CENTER[1] Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent appealed the February 14, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Dennis L. Phelps of Wichita, Kansas, appeared for claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 1, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

In her Application for Hearing, claimant alleged right and left hand injuries caused by repetitive work activities up to and including November 29, 2011. Claimant requested temporary total disability benefits (TTD) and treatment with Dr. Pat Do, with whom she had an appointment scheduled. In his preliminary Order, the ALJ designated Dr. Do as claimant's authorized treating physician and ordered TTD commencing November 29, 2011.

Respondent asserted claimant failed to give timely notice of the accident, that claimant failed to prove she suffered a personal injury by repetitive trauma that arose out

[1] Since claimant filed her Application for Hearing, respondent has changed its name from Promise Regional Medical Center to Hutchinson Regional Medical Center.

of and in the course of her employment and that the ALJ exceeded his authority by selecting an authorized physician of claimant's choosing. Claimant asks the Board to affirm the ALJ's findings that claimant gave timely notice and that she sustained personal injuries by repetitive trauma arising out of and in the course of her employment with respondent. Claimant contends the Board is without jurisdiction to review whether the ALJ erred in appointing Dr. Do as claimant's authorized treating physician. Therefore, the issues are:

1. Did claimant give timely notice of her repetitive trauma injuries to respondent? To resolve this issue, the date of claimant's repetitive trauma injuries must be determined.

2. Did claimant suffer personal injuries by repetitive trauma arising out of and in the course of her employment with respondent? If so, were claimant's work activities the prevailing factor causing her present need for medical treatment?

3. If the Board affirms the ALJ on the aforementioned issues, did the ALJ exceed his authority by appointing Dr. Do as claimant's authorized treating physician?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant began working for respondent on September 7, 2010, as a housekeeper and her duties included mopping, sweeping, dusting, changing beds, and cleaning toilets, sinks and walls. Claimant worked from 7:00 a.m. to 3:30 p.m., five days a week. She spent most of her day cleaning patient rooms, but would also clean public areas and restrooms. Prior to working for respondent, claimant worked at a number of jobs and testified she did electrical work and packing. Claimant is a legal resident of the United States.

In late May 2011, claimant, while at work, began noticing problems with her hands and thumbs. Although she experienced pain in her hands, claimant continued to work. Claimant testified she would occasionally mention her hand pain to Margaret Stanojev, her supervisor, and Jeanie Trudo, the Director of Environmental Services and Laundry. On October 15, 2011, claimant jammed her thumb at work on a microwave and reported the injury. Claimant did not miss work, nor did she seek or receive medical treatment. On November 25, 2011, claimant's hands hurt so much that she spoke to Ms. Stanojev and sought medical treatment. Claimant testified she told Ms. Stanojev that mopping duties caused the hand pain. The pain in claimant's hands had become so severe that she would hold the mop in her forefingers. Ms. Stanojev then told claimant that she would have to see Dr. David G. Anderson, who was located in the building.

On November 28, 2011, after working for several hours, claimant saw Dr. Anderson. His impression was that claimant had bilateral trigger thumbs. Dr. Anderson's records indicated claimant attributed her hand and thumb problems to mopping at work, and that claimant's hands began hurting two months earlier. Claimant also testified that she told Dr. Anderson work activities caused the pain in her hands and thumbs. The doctor noted in his report that claimant should no longer use mops but could use her hands in other activities. Claimant was scheduled to see Dr. Anderson in two weeks for a follow-up visit.

On November 28, 2011, Dr. Anderson drafted a handwritten note stating: "Elena Mendoza should not use mops but may use her hands linens."[2] Claimant took the note to Ms. Stanojev on November 28 or 29, 2011, but she was gone. Claimant then took the note to her lead worker, who instructed claimant to take the note to Ms. Trudo, which claimant did. Claimant indicated she was told by Ms. Trudo to return to work the next day. Later, on November 29, 2011, Ms. Trudo called claimant and told claimant that Dr. Anderson drafted a second note, dated November 29, 2011, which stated claimant could not grasp firm objects such as mops, which cause pressure on the palm side of her thumbs aggravating her trigger thumb condition. Ms. Trudo told claimant that in light of the restrictions contained in Dr. Anderson's second note, respondent had no jobs available for claimant. Claimant testified she was willing to return to accommodated work for respondent.

Claimant saw Dr. Anderson again on or about December 14, 2011. He asked if claimant was working and she explained what happened. Claimant testified that Dr. Anderson indicated he would send another note to respondent indicating claimant "can do linens."[3] December 14, 2011, was the last time claimant saw a medical provider for treatment of her hands and thumbs. The record does not include any documentation of claimant's December 14, 2011, appointment with Dr. Anderson or a subsequent note indicating claimant can do linens. Dr. Anderson did not order any diagnostic tests of claimant's hands and thumbs.

At the request of her attorney, on January 11, 2012, claimant saw Dr. Pedro A. Murati, a physical medicine and rehabilitation specialist. His report indicated that while working for respondent, claimant engaged in repetitive work activities including mopping. The report stated claimant's hands began hurting around November 29, 2011, and that most of her pain is in her thumbs. His impressions were bilateral carpal tunnel syndrome and bilateral thumb tenosynovitis. He recommended a bilateral upper extremity NCS/EMG test, physical therapy, splinting, anti-inflammatory and pain medications, and cortisone injections for the carpal tunnel syndrome, and he recommended steroid injections for the thumb tenosynovitis. If the treatment failed, he recommended surgical intervention. In the

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[2] P.H. Trans., Cl. Ex. 2.

[3] P.H. Trans. at 31.

"Prevailing Factor" portion of his report, Dr. Murati opined that "under all reasonable medical certainty, revealing *[sic]* factor in the development of her conditions, is the repetitive traumas at work and the subsequent lack of appropriate treatment."[4] He also imposed significant temporary restrictions upon claimant.

Prior to working for respondent, claimant had never filed a workers compensation claim. Nor had claimant ever had any treatment for problems with her hands or thumbs. Claimant denied engaging in activities outside of work, before or after November 28, 2011, that would have caused or aggravated her hand and thumb conditions.

Claimant was diagnosed with breast cancer in December 2010, and completed her chemotherapy in March 2011. Respondent's attorney asked claimant if, while receiving treatment for breast cancer, she told Ms. Stanojev, Ms. Trudo or someone else that she had been warned by a doctor that she might have problems with her hands as a result of the medications she was taking. Claimant denied this and again testified work activities caused the pain in her hands and thumbs.

Ms. Stanojev testified claimant would clean rooms that were both occupied by patients and unoccupied. It took considerably longer to clean rooms that were vacated by patients as the rooms had to be completely sanitized. Claimant was assigned to clean fifteen rooms each shift. Ms. Stanojev testified it would take claimant two minutes to mop an unoccupied room and three minutes to mop an occupied room, which means at most, claimant mopped 45 minutes a day. Upon cross-examination, Ms. Stanojev conceded that nearly all the work activities performed by claimant involved the use of her hands and arms. She also acknowledged that tasks such as mopping, sweeping, and cleaning toilets, showers and sinks required claimant to apply pressure with her hands and arms.

According to Ms. Stanojev, in late November 2011 claimant complained of pain in one thumb. Ms. Stanojev thought it was the same thumb claimant injured in the microwave incident in October 2011. She testified claimant never reported that mopping was causing pain in her hands. If claimant had indicated her hand and thumb pain was the result of a work activity, Ms. Stanojev would have insisted that an accident report be completed. While working for respondent, claimant reported an injury on three other occasions. Each time, claimant was required to complete an accident report. Ms. Stanojev also indicated that in October 2011, claimant complained of pain in her hands and claimant commented that it was the chemotherapy drugs, that they sometimes cause problems with a person's hands.

Ms. Trudo testified she was Ms. Stanojev's supervisor. Like Ms. Stanojev, Ms. Trudo testified that claimant complained of pain in her hands and claimant commented that it was the chemotherapy medication. She indicated that up until November 2011

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[4] *Id.*, Cl. Ex. 3.

claimant never reported that she was having problems with her hands doing her normal work activities. At one point, Ms. Trudo stated she learned claimant was alleging a work injury on November 28, 2011, when she was provided the handwritten note of Dr. Anderson by claimant. Ms. Trudo told claimant the note was unacceptable, because it contained no accurate limitations (restrictions). Human Resources then contacted Dr. Anderson about getting specific limitations. Ms. Trudo also indicated that at her request, claimant returned to Dr. Anderson to get clarification on her restrictions and that on November 29, 2011, claimant brought Ms. Trudo a second note from Dr. Anderson dated the same day. Later, Ms. Trudo testified that even after claimant provided the note from Dr. Anderson, Ms. Trudo was unaware what the reasons were for the work restrictions. After getting the November 29, 2011, note of Dr. Anderson, Ms. Trudo decided there was not a job available that could accommodate claimant's restrictions.

On February 14, 2012, ALJ Klein issued his preliminary Order, which stated:

> Dr. Do is designated as the authorized treating physician. Temporary total disability is ordered from November 29, 2011 and continuing until released at MMI or accommodated. The court finds the claimant's testimony credible as to notice of accident and personal injury by accident.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) provides:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in relevant parts:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-520 states in pertinent part:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

K.S.A. 2011 Supp. 44-534a(a)(2) provides in pertinent part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing

> on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2011 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

ANALYSIS

This Board Member finds claimant's date of repetitive trauma injury was November 28, 2011, the date Dr. Anderson restricted claimant to no mopping. This was the earliest date pursuant to K.S.A. 2011 Supp. 44-508 that claimant was deemed to have suffered a repetitive injury. On November 25, 2011, Ms. Stanojev was notified by claimant of her injuries. Ms. Stanojev told claimant to seek treatment with Dr. Anderson, respondent's physician. On Monday, November 28, 2011, claimant provided the note from Dr. Anderson to Ms. Trudo. At one point, Ms. Trudo testified she learned on November 28, 2011, claimant was alleging a work injury.

Respondent presented no evidence it had designated a specific person, pursuant to K.S.A. 2011 Supp. 44-520(a)(2), to whom claimant must notify of her injury. Therefore, claimant's supervisor, Ms. Trudo, was the person to whom notice should be given. Claimant asserts she gave notice of her injuries to Ms. Trudo on November 28, 2011.

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[5] K.S.A. 2011 Supp. 44-534a.

[6] K.S.A. 2011 Supp. 44-555c(k).

The ALJ made a specific finding that claimant was credible. As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,[7] appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. Here, the ALJ had the opportunity to assess claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. This Board Member finds claimant provided timely notice to respondent of her injuries on November 28 or 29, 2011, as required by K.S.A. 2011 Supp. 44-520(a)(1)(B).

Respondent denies claimant suffered personal injuries by repetitive trauma arising out of and in the course of her employment. Claimant testified that her injuries were caused by repetitive work activities. Claimant reported this to Drs. Anderson and Murati. Dr. Murati opined claimant's work activities caused the presentation of the symptoms in her hands. Claimant has never filed a prior workers compensation claim and testified she had engaged in no activities outside of work before or after November 28, 2011, that would have caused her hand and thumb problems. Respondent presented no medical evidence that medications claimant was taking as part of her cancer treatment caused her hand and thumb symptoms. Simply put, claimant met her burden of proof that she sustained personal injuries by repetitive trauma arising out of and in the course of her employment with respondent.

Dr. Murati opined claimant's repetitive trauma at work was the "revealing *[sic]* factor" in the development of her conditions. This Board Member finds the credible medical evidence supports a finding that claimant's work activities were the prevailing factor causing claimant's bilateral hand and wrist pain and present need for medical treatment. No other reasonable explanation for claimant's bilateral hand and wrist pain was offered by respondent. Neither claimant nor any physician related claimant's hand symptoms to the chemotherapy.

Respondent also alleges the ALJ exceeded his jurisdiction in authorizing Dr. Do to be claimant's authorized treating physician. The Board has ruled in the past and continues to hold that this is not a jurisdictional issue subject to review on an appeal from a preliminary hearing Order.[8] Whether the ALJ must, in a given set of circumstances, authorize treatment from a list of three physicians designated by respondent is not a question which goes to the jurisdiction of the ALJ.

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[7] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[8] *Beck v. U.S.D. 475,* No. 1,039,614, 2010 WL 2242752 (Kan. WCAB May 25, 2010); *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997); *Graham v. Rubbermaid Specialty Products*, No. 219,395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

ALJs must routinely determine the most appropriate method of treatment in order to satisfy the Act's goal of curing and relieving the effects of the injury.[9] Selecting one treatment provider over another does not equate to a decision that exceeds the ALJ's authority. Rather, as is contemplated by K.S.A. 2011 Supp. 44-534a, the ALJ determined an issue regarding the furnishing of medical treatment. Whether claimant is in need of medical treatment is an issue the Board does not have jurisdiction to review on an appeal from a preliminary hearing order. Accordingly, the Board is without jurisdiction to review the ALJ's order for medical treatment with Dr. Do.

CONCLUSION

1. The date of claimant's injuries by repetitive trauma was November 28, 2011, and claimant provided notice to respondent the same or next day. Claimant proved, that pursuant to K.S.A. 2011 Supp. 44-520, she gave timely notice of her injuries by repetitive trauma to respondent.

2. Claimant proved by a preponderance of evidence that she sustained personal injuries by repetitive trauma arising out of and in the course of her employment with respondent. Sufficient evidence was presented by claimant to prove that her work activities were the prevailing factor causing her condition and present need for medical treatment.

3. The ALJ did not exceed his jurisdiction by appointing Dr. Do as claimant's treating physician, and, therefore, the Board is without jurisdiction to review that issue.

WHEREFORE, the undersigned Board Member affirms the February 14, 2012, preliminary hearing Order entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of May, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

[9] K.S.A. 2011 Supp. 44-510h(a).

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